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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-374

No. COA21-247

Filed 17 May 2022

Mecklenburg County, Nos. 20CRS203878-81; 20CRS9804

STATE OF NORTH CAROLINA

v.

ERIC WAYNE WRIGHT, Defendant.

Appeal by petition for writ of certiorari from order entered 21 April 2021 and judgment 12 November 2020 entered on or about by Judge Lisa Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Brian M. Miller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals the order denying his motions to suppress and judgment entered upon his *Alford* plea for possession with intent to sell or deliver cocaine, carrying a concealed gun, possession of a firearm by a felon, possession of a stolen

firearm, and attaining the status of habitual felon.[1] Because the findings of fact and conclusions of law did not clearly address all of the material, factual basis for reasonable suspicion, trespassing on City of Charlotte property, we are unable to properly review defendant's arguments, so we vacate and remand for further findings of fact and conclusions of law.

I. Background

¶ 2 Defendant was indicted for carrying a concealed weapon, possession with intent to sell or deliver a controlled substance, possession of a firearm by a felon, felonious possession of a stolen firearm, and attaining the status of habitual felon. On 21 September 2021, defendant filed a motion "to suppress any and all physical evidence seized from Defendant by the police as such evidence was obtained as the

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[1] While defendant filed a "notice of intent to appeal," (capitalization altered), for the order denying his motion to suppress, he requests we consider an appeal from the judgment via a petition for writ of certiorari, due to his counsel's failure to properly appeal the judgment. *See generally State v. Horton*, 264 N.C. App. 711, 714, 826 S.E.2d 770, 773 (2019) ("Upon a guilty plea, a defendant has the right to appeal an order denying a motion to suppress evidence so long as it is an appeal from a judgment of conviction. N.C. Gen. Stat. § 15A-979(b) (2017). If the defendant merely appeals the denial of his motion, rather than the final judgment, this Court lacks jurisdiction over the appeal." (quotation marks omitted)). The State simply notes the issue is in this Court's discretion. In our discretion, we allow defendant's petition for certiorari. *See generally* N.C.R. App. P. 21; *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013) ("We have also held that where a defendant has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust. We are persuaded that [the defendant] lost her right of appeal through no fault of her own, but rather because of an error on the part of trial counsel. Thus, we exercise our discretion and grant *certiorari*." (citation omitted)).

result of an illegal search and seizure of Defendant's person." Defendant contended,

> The search of Defendant's person lacked probable cause and the seizure of his persona lacked the requisite reasonable suspicion. Therefore, the resulting physical evidence is the tainted fruit of the initial illegality. The exclusion of evidence of the search and any evidence obtained therefore is required by N.C.G.S., Section 15A-974 *et seq.* as said evidence was obtained in substantial violation of Chapter 15A of the General Statutes of North Carolina, as well as by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 20 of the Constitution of North Carolina.

¶ 3 Thereafter, on 29 October 2020, defendant filed a motion to suppress the statements he made to law enforcement because defendant did not receive sufficient *Miranda* warnings.

¶ 4 In November 2020, the trial court held a hearing on defendant's motions to suppress. The trial court found:

> 1. That on January 29, 2020, [O]fficer[] Christopher Martin received information from confidential informant (CI) that the defendant, Eric Wright, was armed with a firearm and had just gotten out of prison.
>
> 2. That the CI gave Officer Martin the defendant's location, the 100 block of Phifer Street, described the Defendant as a black male with dreads in a black jacket, blue jeans, and orange shoes riding a bicycle.
>
> 3. That Officer Martin and Officer Slauter testified they observed Defendant enter a pathway marked by a "No Trespassing sign" leading from North Tryon to N. College Street. The "No Trespassing"

signs were posted underneath the overpass next to the pathway.

4. That Officer Martin and Officer Slauter had a combined ten (10) years of experience in that area and knew it to be an area for street level drug transactions.

5. That both officers knew the individuals in that area including those who were homeless and that Officer Slauter in conversation with Defendant identified some of those individuals by real name or street name [sic].

6. That Officer Martin made contact with Defendant on North College Street while wearing uniform and driving unmarked patrol SUV. That there were no police lights flashing.

7. That the Officers requested the Defendant's identification and Defendant provided them with an ID card.

8. That it was cold on January 29, 2020 and Defendant had on[] a heavy jacket and multiple layers of clothing.

9. That Officer Martin asked Defendant for permission to pat him down. Defendant consented to the pat down and upon Officer Martin's request he got off his bicycle, removed his backpack and unzipped his jacket.

10. That Officer Martin frisked Defendant including underneath the outer jacket.

11. That Defendant told Officer Martin and Officer Slauter he was scared of them but did not say why he was afraid.

12. That in their conversation with Defendant, officers did not raise their voice or brandish a firearm.

13. That Officer Martin appeared to have retuned Defendant's identification card based on the conversation between them and the actions that were visible on the BWC.

14. That Officer Martin asked Defendant multiple times to allow him to search his backpack.

15. That Defendant initially said yes but then later refused multiple times.

16. That Officer Slauter then asked Defendant to open the backpack himself and he would look inside.

17. That Defendant consented and opened his backpack.

18. That Officer Slauter asked Defendant to lower the backpack a few times stating he (the officer) was short.

19. Th[at] Officer Slauter saw a grip of a Ruger pistol and stated 94, police code for firearm.

20. The Defendant was immediately detained in handcuffs.

21. That Defendant was informed that he was under arrest for carrying concealed gun.

22. That the Officers told Defendant that they would need to confirm if the gun was stolen.

23. That the Officers did not question Defendant once he was in custody.

24. That Defendant's subsequent statements once in

> custody were made, in what appeared to be, an effort to be cooperative.
>
> 25. That Defendant voluntarily and freely told Officer Slauter that he had "hard" (cocaine) in his pocket when Officer Slauter told him he was going to search him.
>
> 26. That Officers attempted to discourage Defendant from making statements prior to being Mirandized while in custody.
>
> 27. That Defendant was properly [M]irandized by Officer Martin prior to being interviewed at the Law Enforcement Center.
>
> 28. That Defendant spoke knowingly, freely and voluntarily after being Mirandized.

The trial court concluded,

> 2. That the information provided by the confidential informant combined with the officers' knowledge of the area was sufficient as to provide reasonable and articulable suspicion and probable cause for the Officers to engage with the Defendant.
>
> 3. That the Officers initial contact with Defendant was a voluntary contact as they did not make any showing force or intimidation.
>
> 4. That while Defendant, a black male interacting with [a] white officer, made statements about being afraid of police, he did not articulate any reason for that fear. And while studies have shown that individuals of the black race do not feel they have the freedom to deny consent, this subjective view along with race generally is not a deciding factor.

> 5. That it was reasonable for Officers to request the defendant to come off his bike, take of[f] his backpack and unzip his jacket in order to perform a frisk and the frisk of the Defendant did not exceed its scope.
>
> 6. That Defendant was always free to leave during the interaction prior to being detained in handcuffs.
>
> 7. That Defendant freely consented to opening his backpack and therefore allowed for the legal search of his property.
>
> 8. That Defendant's statements once detained were made freely and voluntarily and not subjected to interrogation by the officers.
>
> 9. That Defendant's statements post[-]Miranda were therefore not tainted by Defendant's prior statements pre-Miranda.

¶ 5 The trial court ultimately determined,

> IT IS THEREFORE ORDERED that the Defendant's motion to suppress evidence and statements pursuant to the United States Constitution, the Constitution of North Carolina and Miranda v. Arizona, 384 U.S. 436 (1966), alleging that evidence was obtained as a result of constitutional violations, specifically that the officers did not have reasonable and articulable suspicion nor probable cause to stop the Defendant, that the Defendant was subjected to an illegal search and seizure and that the Defendant was interrogated without Miranda warnings while in custody, shall be DENIED.

¶ 6 Ultimately, defendant, pursuant to an *Alford* plea, pled guilty to the charges against him. The trial court entered judgment. Defendant appeals.

II. Unlawful Seizure

¶ 7 Defendant raises one argument on appeal contending "[t]he trial court erred by denying . . . [his] motion to suppress because the evidence and statements were obtained after . . . [he] was unlawfully seized." Within defendant's argument he raises four separate issues challenging: (1) two of the findings of fact, (2) the trial court's conclusions on what a reasonable person would believe about the encounter, (3) the reasonable suspicions of law enforcement, and ultimately, (4) the trial court's decision to deny his motions to suppress.

A. Standard of Review

> It is well established that the standard of review to determine whether a trial court properly denied a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. Additionally, findings of fact to which defendant failed to assign error are binding on appeal.
>
> Although assignments of error are no longer required under North Carolina Rule of Appellate Procedure 10(a), in order to challenge a finding of fact as unsupported by the evidence, the appellant must make this argument in his brief. *See* N.C. R. App. P. 28(a) (stating that the scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.).

State v. Richmond, 215 N.C. App. 475, 477, 715 S.E.2d 581, 583 (2011) (citations, quotation marks, and brackets omitted).

B. Findings of Fact

¶ 8 Defendant challenges two findings of fact as unsupported by the competent evidence.

1. Trespass Sign

¶ 9 Defendant contends finding of fact 3 is not supported by the competent evidence. Finding of fact 3 provides, "That Officer Martin and Officer Slauter testified they observed Defendant enter a pathway marked by a "No Trespassing sign" leading from North Tryon to N. College Street. The "No Trespassing" signs were posted underneath the overpass next to the pathway." Defendant contends that "there was no evidence that the path was marked with a 'no trespassing' sign either near the entrances or on the path itself. The only 'no trespassing' signs were located in other areas."

¶ 10 The State counters that defendant "appears to misread finding of fact 3" as

> [t]he trial court did not simply say that the dirt path specifically was marked by a 'no trespassing' sign; it said that the officers testified it was marked by such a sign, and that the signs themselves were undeath the overpass next to the path. In any event, it appears that the sign affixed to the overpass could have referred to what was beyond it, including the area encompassing the path, not just the area under the overpass itself.

¶ 11 Defendant then argues in his reply brief that the State's argument has two problems. First, "the trial court's finding clearly suggests that the path was 'marked

by a "no trespassing" sign,' even if that sign was in a different area." "Second, the State's contention that the sign could have applied to different areas is without evidentiary support." Defendant then quotes portions of Officer Martin's testimony.

¶ 12 Turning to the actual evidence before the trial court, we have the State's photograph exhibits of the "no trespassing" sign on the overhead bridge and the path beside it. A literal reading of the sign, as defendant argues, would mean one cannot trespass by climbing the pillar the sign is on but is free to traverse the ground around the pillar. A non-literal reading of the sign, as the State suggests, would mean one cannot trespass in the general area around the sign, including the path around the pillar. The State's reading is also supported by Officer Martin's testimony regarding exhibits:

> Q. With regards to State's Exhibit 3, what does this show?
>
> A. That's a photo that I took. It shows the dirt path on the left and the bridge where it's marked no trespassing.
>
> Q. And with regards to the no trespassing sign, what area is marked -- or, I'm sorry. What area is this no trespassing sign referring to?
>
> A. The area from there to the left to where the fence is of a vacant parking lot and to the right all the way –
>
> MS. DELUCIA: Objection, your Honor. Speculation. How would he possibly know that?

THE COURT: He can answer if he knows.

THE WITNESS: It's City of Charlotte property. The entire area is.

THE COURT: Thank you. Did you finish your answer?

THE WITNESS: Yes, ma'am. I can . . .

Q. With regard to State's Exhibit 4, does this show the same areas depicted in State's Exhibit 3?

A. Yes, ma'am. I took that photo as well.

Q. And there is a fence to the left of the picture. What does that -- what is that fence belonging to?

A. It separates that vacant parking lot.

THE REPORTER: I'm sorry, what parking lot?

THE COURT: You said it separates the vacant parking lot?

THE WITNESS: Yes, ma'am. That's owned by a separate party. The other area to the right is owned by the City of Charlotte. I know that based on my training and experience. I have made arrests there and issued citations in that area numerous times before.

THE COURT: Thank you.

Q. And with regard to State's Exhibit 5, what does that show?

A. I took that photo as well. It's a zoomed-in photo of the actual dirt path and then the fence that separates the property.

> Q. And so then the overpass would be to the right-hand side of the picture?
>
> A. Yes, ma'am.

Based upon the photographs and law enforcement testimony, we determine finding of fact 3 was supported by competent evidence. But the findings do not resolve the factual issue of whether defendant was actually trespassing or whether law enforcement reasonably believed him to be.

¶ 13 We first note finding of fact 3 is actually a recitation of evidence and not a true finding of fact: "That Officer Martin and Officer Slauter testified they observed . . . ." *See generally State v. Derbyshire*, 228 N.C. App. 670, 679–80, 745 S.E.2d 886, 892–93 (2013) ("[M]ere recitation of testimony as to Defendant's blank stare is not sufficient to constitute a valid finding of fact. *See Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("[F]indings of fact must be more than a mere summarization or recitation of the evidence and the [court] must resolve the conflicting testimony.") (citations omitted), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008)." (alterations in original)). The officers did testify as finding of fact 3 provides, but the finding actually states only that the officers testified they saw defendant enter the particular area; it does not resolve the issue of whether defendant was actually trespassing. *See id.* Even the State admits, regarding trespass, "[i]t is true that the factual finding could be more detailed." Nonetheless, the State uses

finding of fact 3 to argue, "the officers had probable cause or reasonable suspicion to suspect defendant trespassed, because the officers knew the property belonged to the City of Charlotte, and because the area was marked by signs." Defendant counters in his reply brief that "the trial court's finding clearly *suggests* that the path was 'marked by a "no trespassing" sign,' even if that sign was in a different area." (Emphasis added.)

¶ 14 We have examined the record before us, and ultimately have come to the determination we must remand the trial court's order for further findings of fact and conclusions of law. *See State v. Neal*, 210 N.C. App. 645, 709 S.E.2d 463 (2011) (remanding order on motion to suppress to the trial court for further findings of fact and conclusions of law on the material conflict in the evidence). The State relies heavily on finding of fact 3 to argue a basis for reasonable suspicion defendant was committing a crime but admits the finding "could be more detailed." Defendant takes a literal approach to the signage and a "suggestive" approach to the finding of fact. Ultimately, because the parties both rely so heavily upon contentions regarding trespass as a reason for reasonable suspicion, the order does not have sufficient findings for appellate review. The parties argue about what law enforcement believed about the sign and whether any such belief that defendant was trespassing was reasonable. But the findings of fact which will determine reasonable suspicion, or even as the State argues it, probable cause, are not borne out by the facts found before

us.

¶ 15 As this Court noted in *Neal*,

> [T]he Supreme Court held in *State v. Booker*, 306 N.C. 302, 312–13, 293 S.E.2d 78, 84 (1982), that a trial court's "failure to find facts resolving the conflicting voir dire testimony was prejudicial error requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made." In explaining its mandate, the Court observed: "*Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial*." *Id.* at 313, 293 S.E.2d at 84. Because, in *Booker*, the Court found no other prejudicial error apart from the inadequate findings as to voluntariness, the Court deemed it unnecessary to order a new trial. *Id.*
>
> Based on *Booker*, we hold that the trial court's failure to make written findings does not require remand for a new trial, but remand for further findings of fact. *See also State v. Baker*, 208 N.C. App. 376, ___, 702 S.E.2d 825, 832–33 (2010) (remanding for findings where court failed to make findings resolving material conflict in evidence as to whether reasonable person in defendant's position would not have felt free to leave); *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 (remanding for findings where court failed to make findings resolving material conflict in evidence as to whether defendant voluntarily consented to search of his room).

Id. at 656, 709 S.E.2d at 470 (2011) (emphasis added) (alterations in original).

¶ 16 The trial court determined there was reasonable suspicion based upon "the

confidential informant combined *with the officers' knowledge of the area*[.]" (Emphasis added.) "[K]nowledge of the area," goes directly to the issue of trespass as is evidenced by law enforcement testimony:

> Q. And with regards to the no trespassing sign, what area is marked -- or, I'm sorry. What area is this no trespassing sign referring to?
>
> A. The area from there to the left to where the fence is of a vacant parking lot and to the right all the way –
>
> MS. DELUCIA: Objection, your Honor. Speculation. How would he possibly know that?
>
> THE COURT: He can answer if he knows.
>
> THE WITNESS: It's City of Charlotte property. The entire area is.

¶ 17 Further, the findings do not address the relevance of the property as "City of Charlotte" property. Cities and towns own much real property, but city ownership does not automatically mean that people are not allowed to enter the property. In fact, cities often own real property which is intended to be open to the public, such as parks, greenways, and sidewalks, although these areas may be restricted at certain times or under some circumstances. Just as with property owned by private landowners, some areas may be posted "no trespassing" and other areas are open for people to enter and pass through.

¶ 18 Accordingly, we remand for further findings of fact and conclusions of law

regarding trespass, including but not limited to, whether law enforcement believed defendant was trespassing, whether this belief was reasonable, and the impact this would have on reasonable suspicion.

> After the trial court makes the necessary findings, it must make appropriate conclusions of law based on those findings. If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial.

Id. at 656–57, 709 S.E.2d at 470–71.

III. Conclusion

¶ 19 We remand for further findings of fact and conclusions of law on the issue of trespass and the officers' reasonable beliefs as to whether defendant was actually trespassing. The trial court's order should be based on the evidence presented in the November 2020 hearing, and we remand without prejudice as to any additional arguments made in this appeal which defendant may again raise in a future appeal.

¶ 20 VACATED and REMANDED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).